Supreme Court, U. S.
FILED
DEC 9 1975
MICHAEL RODAK, JR., CLERK

No. 75-617

# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

RAYMOND GREENBERG and MARILYN GREENBERG,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-617

RAYMOND GREENBERG and MARILYN GREENBERG,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

The petition in this federal income tax case presents two questions: (1) whether distributions received by petitioners on the liquidation of four of five commonly-owned corporations engaged in the same real estate development business were taxable as dividends under Section 316 of the Internal Revenue Code of 1954, as the court of appeals held, or as capital gains under Section 331 of the Code; and (2)

whether the court of appeals correctly held that the Commissioner's introduction at trial of certain documentary evidence complied with the "second inspection" rule of Section 7605(b) of the Code.

The pertinent facts are as follows: In December, 1958, petitioner Raymond Greenberg[1] joined with Simon Sherman and George Revitz to form a partnership known as the Gerasi Partnership for the purpose of engaging in real estate development. In the following months, these three individuals organized five corporations, Colt Development, Inc., Colt Builders, Inc., Colt Homes, Inc., Colt Properties, Inc., and Colt Contractors, Inc. Each of these corporations had essentially identical articles of incorporation and bylaws, had paid-in capital of $3,000, and issued 1,500 shares of stock, divided equally among the three individuals (Pet. App. 4a-6a).

Over the next several years, the partnership, together with the five Colt corporations, engaged in the development of residential subdivisions. The partnership acquired the tracts and then parcelled out individual lots at cost among the five corporations. Each corporation took title to the lots, subject to purchase money obligations executed by the partnership (Pet. App. 6a-7a).

Colt Development paid the initial development and project costs and thereafter allocated the costs among the five corporations on a flat per house rate as they

[1] References to "petitioner" are to Raymond Greenberg. Marilyn Greenberg is a party solely because she filed a joint income tax return for the year at issue.



completed and sold houses (Pet. App. 7a-8a). It also paid the general and administrative expenses of the development and allocated them among the five corporations on a percentage basis (Pet. App. 9a-10a). The books of all five corporations were maintained in a single office by a bookkeeper employed by Colt Development, the only one of the five corporations to have paid employees (Pet. App. 9a, 15a).

When lots were sold, the name of the appropriate Colt corporation would be entered in the standard form sales contract as seller. However, the projects were not otherwise held out to the public as the product of separate companies. Their advertising typically identified the projects solely with Colt Development or simply displayed the phrase "Built by Colt" (Pet. App. 9a, 11a).

In June, 1964, Sherman withdrew from the business by redeeming 500 shares in each of the five Colt corporations and selling his interest in the partnership to petitioner and Revitz. Subsequently, a dispute arose between petitioner and Revitz, which led to Revitz's ultimate withdrawal from the business pursuant to a "buy-out agreement" executed on May 20, 1966. Pursuant to this agreement, petitioner purchased Revitz's interest in the partnership. Revitz's 500 shares in Colt Development were redeemed, and the remaining four Colt corporations were dissolved (Pet. App. 15a, 17a).

Colt Development, in the meantime, continued to engage in further residential development projects

along with the partnership and other companies owned in whole or in part by petitioner (Pet. App. 19a). At the time of their dissolution, the aggregate accumulated earnings of the five Colt corporations substantially exceeded their net assets (Pet. App. 13a, 17a-18a).

On his 1966 tax return, petitioner reported the amounts received on the dissolution of four of the five corporations—Colt Properties, Colt Builders, Colt Contractors and Colt Homes—as liquidating distributions taxable as capital gain under Section 331 of the Code (Pet. App. 19a). However, on audit the Commissioner determined that these amounts were taxable as ordinary dividend income. The Tax Court upheld the Commissioner's determination, finding that the four liquidated corporations had no separate or independent business purpose apart from that of the continuing corporation, Colt Development, so that the receipts in question represented the distribution of the earnings and profits of a single continuing business enterprise[2] (Pet. App. 20a-32a). The court of appeals affirmed *per curiam* (Pet. App. 34a-35a).

1. In *Higgins* v. *Smith*, 308 U.S. 473, 477, this Court long ago established the principle that the

[2] The Tax Court thus found it unnecessary to reach the Commissioner's alternative position that Section 269 of the Code barred capital gain treatment of the distributions at issue. Section 269 provides for the disallowance of any deduction, credit, or other allowance where the principal purpose for acquiring control of a corporation is the avoidance of income tax by securing the benefit, not otherwise available, of such deduction, credit, or other allowance.



Commissioner of Internal Revenue is "not * * * required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him" but "may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." See also *Griffiths* v. *Commissioner*, 308 U.S. 355; *Gregory* v. *Helvering*, 293 U.S. 465, 470. A corporation ordinarily may be treated as an entity separate and apart from its shareholders so long as it engaged in some form of substantial business activity (*Moline Properties* v. *Commissioner*, 319 U.S. 436; *National Investors Corp.* v. *Hoey*, 144 F.2d 466, 468 (C.A. 2)). However, the question here is whether any of the four liquidated Colt corporations served any separate and independent business purpose which would have justified this treatment as entities separate from the remaining unliquidated corporation which continued to engage in the same business enterprise after their dissolution. Without a bona fide business purpose underlying the use of multiple corporations in what is in essence simply a single business enterprise, they may properly be treated as a single corporate entity for tax purposes. See, *e.g.*, *Shaw Construction Co.* v. *Commissioner*, 323 F.2d 316 (C.A. 9), affirming 35 T.C. 1102; *Aldon Homes, Inc.* v. *Commissioner*, 33 T.C. 582.

While neither *Shaw Construction* nor *Aldon Homes* involved the application of Section 331 of the Code,[3] there is no basis for petitioners' contention (Pet. 12-15) that the benefits of Section 331 are available with respect to the liquidation of formally separate corporate structures without regard to whether there is any bona fide business purpose underlying the use of such multiple corporations. The familiar tax doctrine of *Gregory* v. *Helvering*, 293 U.S. 465, that substance controls over form, applies here with no less force. A corporation is not entitled to separate recognition for tax purposes simply to permit the shareholders of a single continuing corporate enterprise to bail out its earnings at capital gains rates.

The decision below therefore correctly held that petitioner's distributions received from the four liquidated Colt corporations were properly taxable as dividends paid out of the accumulated earnings and profits of what was, in substance, a single continuing corporate entity. As the court of appeals concluded, the Tax Court's finding in this regard was "amply supported by the [record]" (Pet. App. 35a). The mere fact that the four liquidated corporations held property in their own name does not compel their separate recognition, no matter how "technically elegant" their adherence to corporate formalities (*Griffiths* v. *Commissioner*, *supra*, 308 U.S. at

[3] Those cases involved the denial of multiple surtax exemptions under the 1939 Code predecessor to Section 1551 of the 1954 Code.



357), where there was in fact no business purpose for the multiple corporation arrangement.[4]

2. Petitioner further challenges (Pet. 16-17) the Tax Court's admission of certain documentary evidence on the theory that such evidence was obtained in violation of Section 7605(b) of the Code. Section 7605(b) generally provides that only one inspection of a taxpayer's books of account may be made for any particular taxable year unless the Secretary or his delegate notifies the taxpayer in writing that an additional inspection is necessary. The materials here in question, however, were not subjected to a second examination by the Internal Revenue Service in connection with an audit. Rather, they were obtained pursuant to judicial subpoenas issued by the Tax Court to petitioner and his accountant for the production of specified corporate records for use in this suit, which petitioner commenced to review the deficiencies which had already been determined.

[4] *Southern Dredging Corp.* v. *Commissioner*, 54 T.C. 705, relied upon by petitioners, is distinguishable. There, the use of multiple corporations in an otherwise integrated dredging business was held not to have been motivated by tax avoidance so as to warrant the application of Section 269 of the Code. The corporations were formed to serve the legitimate purpose in a high risk business of insulating the property held by each corporation from liability arising from the use of property held by the others. Here, on the other hand, the Tax Court correctly rejected a similar contention, noting that the individual partners and shareholders were generally made personally liable on the financing arrangements and that the corporations were all fully insured against the foreseeable risks of the business (Pet. App. 10-11a).

Section 7605(b) does not prohibit the Commissioner from utilizing the provisions of the Tax Court Rules pertaining to the production of evidence properly sought for the purposes of discovery or trial.[5] The fact that petitioner chose not to segregate and personally produce the records sought by the subpoenas, but instead allowed a revenue agent to perform this task does not convert this form of compliance with the subpoenas into an improper "second examination" within the meaning of Section 7605(b).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1975.

---

[5] The power of the Tax Court and its predecessor, the Board of Tax Appeals, to issue such subpoenas has long been recognized by this and other courts. See *Blair* v. *Oesterlein Co.*, 275 U.S. 220; *MacRae* v. *Riddell*, 350 F.2d 291 (C.A. 9).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 598640 148